



SO ORDERED.

SIGNED this 22 day of December, 2005.


JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**PERRY W. QUENZER and
LORI A. QUENZER**

Debtors.

Case No. 99-41732-13

**PERRY W. QUENZER and
LORI A. QUENZER**

Plaintiffs,

v.

Adversary No. 99-7127

**ADVANTA MORTGAGE CORPORATION
USA, CHASE MANHATTAN MORTGAGE
CORPORATION AND DEUTCHE BANK
NATIONAL TRUST COMPANY,**

**Defendants and
Third-Party Plaintiffs.**

v.

**THE MORTGAGE BANC, INC., n/k/a
HOME MORTGAGE, INC.,**

Third-Party Defendant.

MEMORANDUM ORDER AND OPINION

This matter is before the Court on Plaintiffs' Motion for an Order Equitably Modifying Mortgage and Approving Borrowers' Tender in Installments.¹

I. FINDINGS OF FACT

The facts in this case are not in dispute, and the parties have stipulated to the following facts.² On June 7, 1997, Perry W. and Lori A. Quenzer ("Plaintiffs") entered into a home mortgage transaction with The Mortgage Banc, Inc., n/k/a Home Mortgage, Inc., ("Home Mortgage"). Plaintiffs' transaction with Home Mortgage was a consumer credit transaction within the meaning of the Truth In Lending Act (TILA).³ As part of the transaction, Home Mortgage obtained a mortgage in the property commonly known as 209 Hiawatha Avenue, Hiawatha, Brown County, Kansas, which was used by Plaintiffs as their principal dwelling at the time of closing. On the same day it entered into the transaction with Plaintiffs, Home Mortgage assigned the subject mortgage to Advanta Mortgage Corporation, USA, as servicing agent for Bankers Trust Company of California, N.A., as custodian or trustee for an unknown mortgage backed securities trust. Part of the loan was used to pay off a loan from another creditor that had been secured by a mortgage on the home,

¹Doc. 79.

²See Doc. 75.

³15 U.S.C. § 1602(e) and 15 U.S.C. § 1602(h).

leaving Advanta as the first mortgage holder on the property.⁴ The TILA gives borrowers the right to rescind such a refinanced loan.

Home Mortgage gave Plaintiffs an incorrect notice of their right to rescind the transaction in violation of the TILA. When an improper notice of the right to rescind a transaction is given, the borrower has three years from the date of the transaction to rescind the transaction under 15 U.S.C. § 1535(f), rather than the three days typically given to a borrower. Advanta does not dispute that Plaintiffs were given the wrong notice, and were thus entitled to the extended rescission period.

Plaintiffs filed their Chapter 13 bankruptcy petition on August 5, 1999, and a few days later notified Advanta that they were exercising their extended right to rescind the transaction. They then brought this adversary proceeding on December 10, 1999, seeking (1) an order that they had validly rescinded the transaction; (2) an order declaring any mortgages held by Advanta on their real property void and unenforceable; (3) a determination that Advanta had no allowed secured or unsecured claim in their underlying bankruptcy case; (4) an award of \$2000 for each debtor in statutory damages for Advanta's failure to comply with Plaintiffs' election to rescind and an additional award of \$2,000 for each debtor in statutory damages for Advanta's disclosure violation; (5) \$5,000 in statutory damages for Advanta's unconscionable and deceptive business practices

⁴On January 6, 2004, Plaintiffs moved to join Chase Manhattan Mortgage Corporation and Deutsche Bank National Trust Company, on the basis that they were the real party in interest in this case (Doc. 74). On March 3, 2004, this Court entered an order joining those parties as defendants, finding that "[A]ll claims against these two new Defendants are identical to the claims already asserted against Advanta, and no new complaint need be filed by Plaintiffs." *See* Doc. 77. On May 14, 2004, Defendants filed a pleading that makes it clear that Advanta was acquired by Chase Manhattan Mortgage, and Advanta was the servicing agent for Bankers Trust, now known as Deutsche Bank National Trust Company. *See* Doc. 88, n.1. Accordingly, when this opinion speaks of Advanta, it should be deemed to be equally applicable to Defendants Chase Manhattan and Deutsche.

under the Kansas Consumer Protection Act; (6) and an award of their reasonable attorney's fees and costs pursuant to both the TILA and the Kansas Consumer Protection Act. Plaintiffs have abandoned their Kansas Consumer Protection Act claims,⁵ leaving only the TILA claims for adjudication.

II. PROCEDURAL HISTORY

This case was initially assigned to now retired Judge Pusateri, who held that Plaintiff's timely rescission resulted in (1) an automatic voiding of Advanta's security interest and (2) an obligation by Plaintiffs to repay the money given to them, less any prior payments and other deductions (such as statutory penalties that are offset against the debt obligation). Judge Pusateri held that the TILA mandated that the voiding of the security interest occurred immediately upon rescission, irrespective of the return of the money by Plaintiffs, and that Plaintiffs were in essence left with an unsecured debt to Advanta, which could be discharged in the pending bankruptcy proceeding upon completion of their Chapter 13 plan.

Advanta appealed this decision, and the United States District Court remanded the case, finding that this Court could and should condition the release of the lien on payment by Plaintiffs, rather than the lien being automatically voided and released prior to Advanta's receipt of the money owed. The District Court also remanded the case for a decision whether the statutory penalties sought by Plaintiffs were barred by the applicable statute of limitations. On remand, this Court was directed to determine what equitable conditions should be placed upon the parties to effectuate the rescission, and to determine whether the statutory penalties are time-barred.

III. ANALYSIS

⁵Doc. 48 at p. 16.

This Court must therefore decide two issues on remand. First, the Court must decide whether Plaintiffs' claims for statutory penalties are in the nature of an offset, and thus not barred by the statute of limitations, or whether they are affirmative, and thus beyond the applicable period of limitations. Second, the Court must decide under what terms Plaintiffs' rescission of their mortgage will occur.

A. Plaintiffs' claims for statutory penalties are barred, in part, by the statute of limitations.

As part of the relief sought in this adversary proceeding, Plaintiffs seek damages pursuant to 15 U.S.C. § 1640. Plaintiffs claim that they are entitled to damages on two grounds – the failure by Advanta's predecessor to provide the appropriate TILA disclosures, and Advanta's failure to comply with Plaintiffs' election to rescind the transaction. This Court previously determined that a penalty is warranted based upon Advanta's actions, and has already set the amount of that penalty.⁶ Neither party appealed the amount of the penalty.

Advanta is, however, challenging the imposition of any penalty based upon the improper disclosure on the basis that it is barred by the statute of limitations. The District Court remanded the case to this Court to determine if Plaintiffs were actually seeking a setoff or recoupment, which is authorized beyond one year by 15 U.S.C. § 1640(e), or if Plaintiffs were seeking affirmative relief, which would be barred by § 1640.

The relevant subsection of 15 United States Code provides:

⁶Judge Pusateri found that the statutory penalties for both the disclosure violation and the rescission violation should be set at \$2000 per violation since Advanta is entitled to keep its mortgage pending payment by Plaintiffs of their tender obligations. He also held that Debtors were not each entitled to the maximum penalty. Doc. 57 at p.9.

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law⁷

It is clear from this language that a debtor may seek a recoupment or set-off against a lender beyond the one year statute of limitations. However, the Court finds, for the reasons below stated, that because Plaintiffs specifically sought affirmative relief by bringing this adversary proceeding, their claim for relief as a result of the improper disclosure is barred by the one year statute of limitations.

Plaintiffs initiated this adversary proceeding by filing a Complaint to Enforce Truth in Lending Rescission on December 10, 1999. In that Complaint, Plaintiffs claimed that they were “entitled to an award of \$2,000.00 **affirmative damages**”⁸ for the TILA violations. Plaintiffs did not claim they were seeking a recoupment or set-off against the proof of claim filed by Advanta, but, instead, that they were specifically seeking affirmative relief.

In addition, Plaintiffs filed their adversary proceeding seeking “affirmative damages” before Advanta ever filed its Proof of Claim in the main bankruptcy case.⁹ Thus, Plaintiffs’ suggestion that it sought \$2,000 in recoupment as a defense to Advanta’s first filing a Proof of Claim—and that the statute of limitations thus did not bar the claim—is belied by the order of events. Therefore, Plaintiffs’ claims for statutory damages under the TILA for the defective disclosure are barred by the statute of limitations.

⁷15 U.S.C. § 1640(e).

⁸Doc. 1 (emphasis added).

⁹Advanta’s Proof of Claim was filed January 21, 2000, more than a month after Plaintiffs filed their claim for affirmative relief against Advanta. *See* Proof of Claim No. 18.

Conversely, although not addressed by the parties, the Court finds that the statutory penalties for Advanta's actions relating to the Plaintiffs' rescission request are clearly not barred by the statute of limitations. Plaintiffs first initiated the rescission process on August 19, 1999, by sending notice to Advanta that they were exercising their right to rescind the transaction pursuant to the TILA. The complaint in this case was filed less than one year later and was therefore timely. For that reason, Plaintiffs are jointly entitled to one \$2,000 award of statutory penalties for this particular violation of the TILA.

B. The Court will condition the voiding of the mortgage lien upon full tender by Plaintiffs.

The second issue before the Court is under what terms and conditions the Court should condition the voiding of Advanta's mortgage lien against Plaintiffs' homestead. Based upon the rulings by the District Court in *Quenzer*, it is clear that this Court "may impose conditions that run with the voiding of a creditor's security interest upon terms that would be equitable and just to the parties in view of all the surrounding circumstances, and that it should require the debtor's return of property received in connection with the transaction as a condition to rescission."¹⁰ The two issues on which the parties disagree are whether Plaintiffs should be allowed to repay the tender amount to Advanta over time, and if so, whether Advanta is entitled to any interest over such repayment period.

1. The Court will not award Advanta interest in this case.

The Court finds that Advanta is not entitled to interest on the money it advanced to Plaintiffs in this transaction. The starting point on the issue of interest is the statutory language of the TILA itself. Section 1635(b) states that when an obligor exercises his right to rescind "he is not liable for

¹⁰*Quenzer v. Advanta Mortgage Corp. USA (In re Quenzer)*, 288 B.R. 884, 889 (D. Kan. 2003).

any finance or other charge.”¹¹ Therefore, it appears from the plain statutory language that Advanta is not entitled to any finance charges in this case. However, because rescission, whether statutory or common law, is an equitable remedy, the Court has the ability to consider equity when ordering rescission.

Advanta relies upon *Rachbach v. Cogswell*,¹² to support its position that the Court can, and in fact should, award interest despite the language contained in § 1635(b). In *Rachbach*, the trial court awarded interest despite the statutory language, finding that the statutory language did not prohibit the court from doing equity, and that because the borrowers had the use of the loan proceeds, the payment of interest on those loan proceeds was an equitable condition to the right of rescission.¹³ Although it is true that the Tenth Circuit Court of Appeals affirmed the trial court’s interest decision in *Rachbach*, it did not do so on the merits of the trial court’s decision. Instead, its decision was expressly based on the fact it was presented with “an incomplete record,” which required the Circuit to find that it could not “say that the trial court abused its discretion in the imposition of an equitable condition to the right of rescission.”¹⁴

This Court finds that given the nature of rescission under the TILA, and the policies that surround it, interest should not be awarded in this case as an equitable condition of the right of rescission. As another judge of the United States District Court for this District recently noted in a different TILA case emanating from this Court, “Rescission, whether statutory or common law, is

¹¹15 U.S.C. § 1635(b).

¹²547 F.2d 502 (10th Cir. 1976)

¹³*Id.* at 505.

¹⁴*Id.*

an equitable remedy. Its relief, in design and effect, is to restore the parties to their pre-transaction positions.”¹⁵ The Court finds that charging Plaintiffs interest on the funds, especially at the contract rate of interest, would not serve the purposes of rescission, and instead would place the parties in the position they were at on the date of judgment, rather than their pre-transaction positions. The TILA does not seek to retain the status quo as of the date of rescission (here more than two years after the money was loaned), or as of the date final judgment is entered. That would be the result under Advanta’s position. Instead, the TILA seeks to return the parties to the financial place they were before the transaction ever occurred.

The District Court in *Ramirez* also touched on another aspect of rescission under the TILA that supports this Court’s decision not to award interest to Advanta. Judge Robinson held that

The TILA requires the lender to return the finance charges and take steps to terminate the security interest first, before requiring the borrower to payoff the principal balance. This allows the borrower to seek a new loan, having the benefit of cash in the amount of the refunded finance charges, which might be used for loan fees or other charges. . . . The TILA recognizes, in effect, that a borrower who wishes to rescind a loan may not have the means to repay the principal balance of the loan without first securing new financing.¹⁶

If the Court were to award Advanta finance charges in this case, Plaintiffs’ ability to obtain the necessary financing to repay the balance owed to Advanta would necessarily be impaired. Here, a lender will know that at closing, Advanta will receive the tender amount in exchange for a release of Advanta’s mortgage. Because the amount Advanta will receive at such closing will not include these finance charges, Debtors should be able to more readily attract new financing.

¹⁵*Ramirez v. Household Finance Corp. III*, 329 B.R. 727, 738 (D. Kan. 2005).

¹⁶*Id.* at 738-39.

The Court wishes to emphasize that denial of Advanta's claim for interest is not intended in any way to be punitive for violating the TILA – that is the role of the statutory penalties specifically provided in that Act, which penalties this Court has awarded (admittedly in a lesser amount than Plaintiffs sought because of the expiration of the period of limitations on the defective notice claim). The Court also recognizes that Advanta will suffer a hardship in that it will have lost the use of those funds for over six years without interest. Because Advanta chose to appeal, and the appeal took over two years to resolve, one party or the other must necessarily endure the burdens of that court delay.¹⁷ Again, as between Advanta, who admittedly committed the TILA violation and who chose to appeal,¹⁸ and Plaintiffs, this Court must consider the relative potential hardships imposed if interest is ordered repaid, or if interest is forgiven.

When faced with balancing the potential burdens in this case, and in an effort to do equity, again, the Court cannot overlook the fact that it was Advanta's actions in violating the TILA that set this dispute into motion. Therefore, although not seeking to penalize Advanta beyond what the TILA expressly provides, the Court finds that because one of the two parties to this lawsuit must bear the

¹⁷This case was also delayed when this Court stayed the “remedy” phase of the case, after briefing, to await the District Court's decisions in *In Re Ramirez*, 01-7122 and *In Re Merriman*, 01-7142, which appeals had been pending for some time. This Court stayed the case because it believed the decisions in those cases would provide invaluable guidance in this case. *See* Doc. 90.

¹⁸The Court is not, in any way, suggesting that Advanta should not have appealed Judge Pusateri's decision. In fact, Advanta was largely successful on that appeal. The Court is merely pointing out that the length of time required to resolve this dispute, including court delays, were a direct result of Advanta's actions (or those of Advanta's predecessor in interest). Therefore, the issue of who should bear the burden of the lengthy delay in resolving this dispute should fall on Advanta.

burden of delay, it should be Advanta. For these reasons, the Court finds that Advanta is not entitled to any interest on the funds it transferred to Plaintiffs in this transaction.

2. Plaintiffs will not be allowed to make their tender in installments.

Plaintiffs request they be allowed to make their tender payment in installments, interest free, over the next seven years. Plaintiffs raise six arguments in support of this request.

First, they claim that there should not be any mortgage on their home at all, arguing that the rescission of the transaction automatically voided the mortgage. This issue was decided on appeal by the District Court in favor of Advanta. Therefore, it does not provide any basis for allowing Plaintiffs to make installment payments over a shortened term.

The second and third bases for Plaintiffs' request deal with the terms of the underlying mortgage agreement, which has now been rescinded. Plaintiffs claim that the interest rate was much higher than the market rate at the time the parties entered into the transaction, and that it contained a balloon payment that they did not fully understand. Although these are valid arguments in favor of allowing rescission, the Court fails to see how the unfavorable terms of the mortgage support Plaintiffs' position concerning repayment of the mortgage that the District Court has found should not be voided until Advanta has received its principal. At this point, the Court is faced with finding the most equitable conditions to place the parties in the position they were in prior to this transaction, not whether Advanta should be further punished for its actions surrounding the transaction.

The fourth basis for Plaintiffs' request is that Advanta has filed a Third-Party Complaint against Mortgage Banc and that Mortgage Banc is allegedly in default. Apparently Plaintiffs are arguing that they should be allowed to make their tender payment in installments because Advanta will be able to collect an indemnification judgment against Mortgage Banc, and thus would not be

harm by the installment plan. As a preliminary matter, the Court has absolutely no evidence before it that Mortgage Banc is solvent, or that Advanta could collect the sum, even if judgment is granted. Secondly, the Court is attempting to determine what equitable conditions should play a role in returning the parties to their pre-transaction positions. Any potential claim that Advanta may have against third-parties is not relevant to the issue before the Court.

Plaintiffs' fifth basis for requesting a seven-year, interest free repayment is that they did not obtain any real benefit from the transaction. Assuming this were true, it again does nothing more than show a valid reason for rescinding this transaction. It does not shed light on what would be the most fair way to return the parties to their pre-transaction positions.

Finally, Plaintiffs argue that they should be allowed to tender their payment in installments because this loan falls under the Home Ownership and Equity Protection Act of 1994 ("HOEPA").¹⁹ This argument, like almost all of Plaintiffs' arguments, essentially boils down to a claim that Advanta's actions surrounding this transaction were so predatory that they should be allowed to repay this debt, interest free, for an additional seven years. This would have the effect of turning a 15-year mortgage with a substantial balloon payment and a 13% interest rate into a 14-year, fully amortized, interest free mortgage. It would also place Advanta into the position of an involuntary mortgage lender of Plaintiffs, despite the fact Plaintiffs sought to terminate this relationship by rescinding the transaction. This would be a complete windfall to Plaintiffs, and an enormous burden on Advanta. This result would not be equitable under the facts of this case, especially in light of the benefit

¹⁹Subtitle B of Title 1 of the Riegle Community Development and Regulatory Improvement Act, Pub. L. No. 103-325 (Sept. 23, 1994) (codified as an amendment to the Truth In Lending Act, at 15 U.S.C. § 1601 *et seq.* (1994)).

Plaintiffs are receiving by not having to repay any interest up to the date they must tender the determined amount.

Plaintiffs elected to terminate their relationship with Advanta by voluntarily rescinding this transaction. The effect of this rescission is that the transaction is to be undone, with Plaintiffs returning the money loaned to them by Advanta, and Advanta releasing its security interest in the Plaintiffs' homestead, in that order. Plaintiffs' position would not accomplish the termination of the relationship in an equitable fashion.

The Court finds that what would best place the parties back into the position they were in pre-transaction would be to find a way for Plaintiffs to obtain funds from a different lender, with whom they do choose to do business, so that Advanta can be paid its principal and the parties can part company.²⁰ As noted by the District Court in *Ramirez*, it is reasonable to expect that a borrower who rescinds a transaction may be required to obtain new financing to repay the money obtained in the now rescinded transaction. The fact that the Court is disallowing Advanta any interest or finance charges should greatly assist Plaintiffs in obtaining substitute financing to repay Advanta. In fact, the property in question was valued by Plaintiffs at \$84,000 at the time this case was filed in 1999,²¹ and Plaintiffs' tender payment to Advanta, which will be discussed in more detail below, is approximately \$46,000 – leaving a very significant equity cushion in this property to induce a subsequent lender to refinance the property.

²⁰This ruling certainly does not preclude the parties from deciding that they wish for Advanta to become the new lender on any refinancing, if that is the choice of both parties. This ruling doesn't suggest that Advanta has any duty to refinance, however.

²¹*See In re Quenzer*, Case No. 99-41732, Schedule A (attached to Doc. 1).

Accordingly, the Court denies Plaintiffs' request to tender their obligation in installments. Instead, the Court will require Plaintiffs to submit their full tender obligation within sixty (60) days of the date of this order.

C. The amount of Plaintiffs' tender obligation is \$46,344.42.

According to the facts stipulated to by the parties, the total amount of money or other property given to Plaintiffs in connection with this transaction was \$69,600.00. The total amount of money paid by Plaintiffs in connection with the transaction is \$21,255.58, which includes both closing costs and principal and interest payments. Because the Court has determined that Advanta is not entitled to any interest payments or finance charges, and that Plaintiffs are entitled to statutory penalties in the amount of \$2,000, the total amount of Plaintiffs' tender to Advanta is \$46,344.42.²² The Court will allow Plaintiffs sixty days from the date of this order to fulfill its tender obligations. Advanta will be ordered to release its security interest in the property upon payment of this amount.

If Plaintiffs fail to tender this amount within sixty days, Advanta will be entitled to interest on this tender amount beginning on the sixty-first day at the federal judgment rate set forth in 28 U.S.C. § 1961(a) that was in force on the sixty-first day after the entry of this order. Advanta will further be deemed, on the sixty-first day after entry of this order, to have relief from the stay to foreclose its mortgage on the real property in the amount of \$46,344.42, plus interest at the statutory

²²The Court recognizes that Plaintiffs sought affirmative relief in their request for statutory penalties, and that the Court is now actually offsetting the statutory penalties against the tender amount. The Court believes that it would be simpler for the parties to account for the money in this manner, rather than requiring Advanta to pay Plaintiffs \$2,000 and have Plaintiffs, in turn, have to pay an additional \$2,000 to Advanta. Because the Court has found that the voiding of the mortgage in question is to be conditioned on Plaintiffs' tender payment, and has ordered Plaintiffs to make their payment within 60 days, the Court is unaware of any harm that would be caused by handling the statutory penalties in this manner.

rate until paid in full. If Plaintiffs have been unable to effectuate this rescission within 60 days through no fault of their own, and are still desirous of retaining the property, they may file a motion seeking to keep the stay in place to allow them to complete the rescission within some reasonable period of time. That motion shall recite the efforts they took to timely tender and indicate how their failure to timely tender is as a result of factors totally beyond their control. Plaintiffs shall promptly notice any such motion for a hearing.

IT IS, THEREFORE, BY THIS COURT ORDERED that Plaintiffs will be required to tender payment to Advanta Mortgage Corporation USA in the amount of \$46,344.42 within sixty (60) days of the date of this order. Upon receipt of funds in this amount, Advanta shall be required to release its mortgage lien against Plaintiffs' property that is at issue in this case.

IT IS FURTHER ORDERED that Plaintiffs' counsel is to submit an itemized statement of any attorney fees and costs he is claiming in relation to this adversary proceeding to counsel for Advanta within ten (10) days of Plaintiffs' tender and Advanta's release of its mortgage. If the parties are able to file a joint stipulation regarding the appropriate amount of attorney fees to be awarded in this case, that stipulation shall be filed within fourteen (14) days after Plaintiffs' attorney provides the itemization. In the event the parties are unable to resolve the issue of attorney fees among themselves within this time frame, Plaintiffs' counsel is ordered to file a motion for attorney fees and costs, coupled with an itemization of time spent and costs incurred, within seven (7) days after the stipulation was due, if one existed, to which Advanta will be given thirteen (13) days to respond. Plaintiff shall then respond thirteen (13) days after that, if desired, at which time the issue of attorney fees and costs will be taken under advisement.

IT IS FURTHER ORDERED that the Plaintiffs' claims under the Kansas Consumer Protection Act are dismissed, with prejudice.

IT IS FURTHER ORDERED that Advanta shall, within ten (10) days of this order, either move for default judgment on its third-party complaint against Home Mortgage, Inc., or file a Notice of Dismissal of that third-party complaint. Failure to do either within ten days shall result in the Court assuming Advanta has no objection to the Court's dismissal of that complaint for lack of prosecution.

IT IS FURTHER ORDERED the foregoing discussion shall constitute findings of fact and conclusions of law under Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52(a). A judgment reflecting this ruling will be entered on a separate document in compliance with Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 58 forthwith. The Court will retain jurisdiction only over Plaintiffs' request for attorney fees under the TILA.

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